No. 13127

United States
Court of Appeals
For the Ninth Circuit

INLAND MOTOR FREIGHT, INC., a Corporation, and PACIFIC HIGHWAY TRANSPORT, INC., a Corporation,

Appellants,

vs.

ANCHOR CASUALTY COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLANTS

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

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NATIONAL PRINTING CO. 62933

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STATEMENT OF JURISDICTION

DISTRICT COURT:

This matter was commenced by Appellee in the District Court of the United States, for the Eastern District of Washington, Northern Division, seeking recovery of a sum in excess of THREE THOUSAND DOLLARS ($3,000.00). Appellee is a Minnesota corporation and Appellants are Washington corporations (see Complaint, Record p. 3).

Said jurisdiction is founded upon Title 28, Section 1332 of United States Code, "Diversity of Citizenship - Amount in Controversy," Act June 25, 1948, c646, Sec. 1, 62 Stat. 930.

COURT OF APPEALS FOR NINTH CIRCUIT:

Judgment in said District Court was entered in favor of Appellee against Appellants July 30th, 1951 (Record, p. 45). From this judgment Appellants have appealed to United States Court of Appeals for the Ninth Circuit.

Jurisdiction therefor is founded upon Title 28, Section 1291 of United States Code, "Final Decisions of District Courts," Act June 25, 1948, c646, Sec. 1, 62 Stat. 929.

STATEMENT OF CASE

This action is brought to recover claimed short rate cancellation premium on public liability policy written by Appellee and covering Appellants concerning their respective fleets of trucks in intrastate and interstate operation as common carriers. The policy form and endorsements used are indicated in the printed Record, pp. 7 through 29. The premium to be paid under said policy was specially set forth by Endorsement No. 7 (Record, p. 25) and was stated thereon as follows:

> "The earned premium shall be computed and paid monthly by applying to the gross receipts, as hereinafter defined, the rate of $.90 . . . for the Inland Motor Freight, Inc., and the rate of $1.35 . . . for the Pacific Highway Transport, Inc."

Appellee had insured Appellant companies for a number of years. The policy in question, by its term, ran from April 1, 1949 to April 1, 1950. The coverage was cancelled by Appellants as of June 1st, 1949 after request and invitation so to do.

Appellee claims additional premium through application of short-rate cancellation table in the sum of FIVE THOUSAND ONE HUNDRED TWENTY-ONE and 40/100 ($5,121.40) DOLLARS. Appellants contend they have paid all premiums payable under said policy on earned premium basis and that "the customary short rate table and procedure" is inapplicable to this policy, notwithstanding its appearance in the printed policy form used, in view of the alteration of said policy form by endorse-

ment; and the special monthly earned premium provisions.

The District Court entered judgment in favor of Appellee, from which judgment this appeal has been taken.

SPECIFICATION OF ERRORS

Appellants urge that the District Court in granting Appellee's Motion for Summary Judgment and in denying Appellants' motion therefor was in error because of the following:

1. The short rate cancellation provision of the basic policy form here used was not applicable because the insurance contract was altered by endorsement as to premium and method of payment.

2. The short rate cancellation provision of the basic policy form here used was not applicable because Appellee requested and induced the cancellation of said policy.

ARGUMENT

This case presents one issue, namely whether the short rate cancellation provision of the printed policy form used is to be applied. Appellants contend that it does not and cannot so apply

1. Because the basic printed policy form used by Appellee was changed by endorsement into a different contract and that the resultant contract of

insurance was one of special coverage concerning Appellants' fleets of trucks and was far different from the standard one-vehicle coverage for which said printed form was obviously intended, and

2. Because, although the policy was admittedly cancelled by Appellants, it was so cancelled at the request and inducement of Appellee.

The policy form and endorsements are in the Record, pp. 7 through 29. The policy form without endorsements is the standard form of insurance coverage for a single vehicle. The form itself contemplates a single prepaid premium for the entire policy period designated. The application to such premium and such unaltered policy of the "customary short rate table and procedure" is readily understandable. The front page of the policy (Record, p. 7) indicates as to premiums "See End. No. 1". The said Endorsement No. 1 (Record, p. 11) obviously is not the one meant, but it was probably intended by Appellee to refer to Endorsement No. 7 (Record, p. 25). Endorsement No. 7, together with the other endorsements concerning compliance with interstate commerce act and I. C. C. rules and regulations, molds the contract into one of a different nature. Said Endorsement No. 7 provides that "The earned premium shall be computed and paid monthly." There is no prepaid term premium and Appellee was paid in full each month in accordance with the gross receipts formula.

The District Court Judge cites the six cases follow-

ing as supporting his construction of this present policy and his decision of the matter:

Port Iron & Supply Co. v. Moore, 153 S.W. (2d) 319;

Aetna Life Ins. Co. v. American Zinc Lead & Smelting Co., 154 S.W. 827.

Aetna Life Ins. Co. v. Kansas City Electric Light Co., 171 S.W. 580.

Big Run Coal Co. v. Employers Indemnity Co., 174 S.W. 25.

Joseph Weaver & Son v. Home Life & Accident Co., 221 S.W. 299.

Maryland Cas. Co. v. Boise Street Car Co., 11 P. (2d) 1090.

A reading of these cases indicates that in every instance the contracts of insurance coverage involved therein referred to *annual* premiums, or *annual* income, or minimum *annual* premium, or estimated *annual* gross earnings. It is fairly readily seen, from these cases, that the contracts concerned were written with an *annual* minimum premium in mind and mentioned in the contract.

In the instant case, however, the only premium mentioned is monthly and the only earned premium is that mentioned and defined in said Endorsement No. 7.

In the case of *Hobson v. Mutual Health and Accident Assn.,* 227 Pac. (2) 761 (Calif. 1950), the Court stated as follows:

> "In construing an insurance policy it must be borne in mind that where two constructions are reasonable that which is most favorable to the insured should be adopted . . . "

And also

> "The policy should be read as a layman would read it and not as an attorney or an insurance expert might read it."

Then, in *29 American Jurisprudence,* page 180, is found the following:

> "The general rule applicable to contracts generally, that a written agreement should, in case of doubt as to the meaning thereof, be interpreted against the party who has drawn it, is very frequently applied to policies of insurance and constitutes an important rule of construction in such respect, in view of the fact that ordinarily, and in practically all cases, it is the insurer who furnishes or prepares the policies used to embody the insurance contracts."

And, in *12 American Jurisprudence,* page 797, the following:

> "It is a well-settled rule of law that where part of a contract is written and part is printed, and the written and printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole, the words in writing will control. The reason greater effect is given to the written than to the printed part of an agreement, if they are inconsistent, is that the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims."

And as to conflict between printed matters on plaintiff's forms and typewritten matters added thereto by endorsement, it is submitted that the typewritten pro-

visions will prevail. This because they obviously are "immediate language and terms selected."

And, here it should be noted (because not apparent in the printed record) that the provisions concerning the premiums in Endorsement No. 7 are typewritten in blank space on an otherwise printed form. Further to be noted is that the printed sentence "Subject in all other respects to the limits of liability, exclusions, conditions and other terms of the policy" appears near the bottom of the page and after an inch and a half space below the typed-in matter and also following the printed "Effective date of this endorsement."

In the case of *Hawkeye Commercial Men's Assn. v. Christy* (C.C.A.), 294 Fed. 208, is found the following language:

> "The natural obvious meaning of the provisions of a contract should be preferred to any curious, hidden sense which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind would discover."

Ordinarily, earned premium is understood as that part of a paid-up premium which covers the time which has elapsed since the insurance began. The earned premium here was paid exactly as required under the special definition of "earned premium." (Endorsement No. 7, Record p. 25). An unearned premium, upon the cancellation of a policy, usually means that portion of the premium that is returned to the insured. And, it is further submitted that in ordinary insurance parlance,

"short rate cancellation" means and results in the *return* to the insured of the unearned premium. Here there is no such thing as unearned premium.

The basic printed policy form has been amended by several endorsement riders. Endorsement No. 7 provides that the earned premium shall be computed and paid monthly at stated rates as applied to gross receipts. The premium is in no wise fixed but is to be determined month by month. There is no means by which the insured could anticipate or compute any cancellation penalty; and by the same token it is submitted there is no means by which the insurer could compute and maintain an "unearned premium reserve" upon its books.

If there was intended any short-term cancellation formula or any cancellation penalty, the same could and should have been clearly stated on Endorsement No. 7. The absence of any such provision indicates that the changes of the basic policy form by said endorsements to a contract covering the respective fleets of equipment of Appellants and based upon gross receipt premiums computed and paid monthly negate the applicability and effect of the customary short rate table and procedure. There was nothing *customary* about this policy. As amended, it was altered to an entirely different and special contract.

Appellee requested and induced the cancellation of this policy. These parties had contracted in similar

manner for several years (Nieman deposition, Record p. 54). Appellee was familiar with the operations of Appellants and with Appellants accident ratio. Through its brokers, Gould & Gould, Appellee told Appellants in 1949 that the premium rate on their coverage was to be increased and that Appellants should seek and obtain other and substituted insurance coverage (Deposition, Record p. 52). There never was any discussion or consideration given any cancellation penalty or short-term cancellation computation of premium. Appellee was interested in increased monthly premium rate and was interested in terminating their insurance coverage of Appellants.

Appellants are common carriers in intrastate and also interstate operation and, of course, must comply with the regulations of the regulatory board and commissions in maintaining proper liability insurance coverage at all times. Upon being advised by Gould & Gould that the premium rate on the existing coverage was to be increased and upon receiving the request of Gould & Gould that Appellants obtain other insurance coverage, Appellants had no choice in the matter; they had to have proper coverage and the cancellation of the policy with Appellee was a natural result of Appellee's own invitation and request (Deposition, Record p. 55).

Appellants therefor contend and urge that The District Court erred in granting judgment to Appellee. Appellants pray that this Court reverse the decision and

judgment of the said District Court and direct the dismissal of Appellee's Complaint and said action.

Respectfully submitted,

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